

THE GREENHOUSE GAS POLLUTION PRICING ACT AND THE INTERACTION OF FEDERAL AND PROVINCIAL ENFORCEMENT EFFORTS

Fenner L. Stewart & Scott Carrière

A Symposium on
Environment in the Courtroom:
Enforcing Canadian GHG Emissions Laws

October 25 and 26, 2018
Université Laval



UNIVERSITÉ
LAVAL

Faculté de droit
Chaire de recherche du Canada
en droit de l'environnement



UNIVERSITY OF CALGARY
FACULTY OF LAW



Canadian Institute of Resources Law
Institut canadien du droit des ressources

This project was undertaken with the financial support of:
Ce projet a été réalisé avec l'appui financier de :



Environment and
Climate Change Canada

Environnement et
Changement climatique Canada

The Canadian Institute of Resources Law encourages the availability, dissemination and exchange of public information. You may copy, distribute, display, download and otherwise freely deal with this work on the following considerations:

- (1) You must acknowledge the source of this work
- (2) You may not modify this work, and
- (3) You must not make commercial use of this work without the prior written permission of the Institute.

Copyright © 2018

THE GREENHOUSE GAS POLLUTION PRICING ACT AND THE INTERACTION OF FEDERAL AND PROVINCIAL ENFORCEMENT EFFORTS

Fenner L. Stewart[†]
Scott Carrière[‡]

Foreword: A Note on Indigenous Peoples and the Constitution

Indigenous peoples deserve meaningful voice in Canadian governance. An administrative “duty to consult” is a poor substitute for a seat at the table of Canadian federalism. The Constitution leaves little space for workable Indigenous self-determination.¹ Not acknowledging this need for change facilitates our law’s long affair with the Doctrines of Discovery.²

I. Introduction

On June 21 2018, Bill C-74 received Royal Assent and Canada’s first national carbon pricing initiative passed into law. It is called the *Greenhouse Gas Pollution Pricing Act* [GGPPA].³

Although GGPPA has faced some surprisingly strong resistance in the media, its need is unquestionable. On October 8th 2018, the United Nation’s Intergovernmental Panel on Climate Change released an urgent plea that the global community has less than 12 years to radically alter its consumption of carbon-intensive fuels, or it will suffer catastrophic environmental change.⁴ Although some assume that this warning is exaggerated, science verifies the gravity of the situation.⁵

This article provides an overview of GGPPA with a particular focus on its enforcement mechanisms. Part II will explain the rationale for carbon pricing. Part III outlines how carbon pricing under the GGPPA works. Part IV explores the Constitutional validity of GGPPA. Part V will explain GGPPA’s enforcement mechanisms. Part VI is the conclusion.

II. A Rationale for Carbon Pricing

[†] Fenner Stewart is an Associate Professor at the University of Calgary, Faculty of Law.

[‡] Scott Carrière is an JD Student at the University of Calgary, Faculty of Law.

¹ Jeremy Webber, “Contending Sovereignties” in Peter Oliver, Patrick MacKlem & Nathalie Des Rosiers, eds, *The Oxford Handbook of The Canadian Constitution* (New York: Oxford University Press, 2017) 291 [Oxford Handbook].

² John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto:) University of Toronto Press, 2016) 44-47; and Naomi Metallic, “The Relationship between Canada and Indigenous Peoples: Where Are We?” in Law Society of Upper Canada, eds, *Special Lectures 2017: Canada at 150: The Charter and the Constitution* (Toronto: Irwin Law, 2018) at 446.

³ *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186 [GGPPA].

⁴ United Nations Intergovernmental Panel on Climate Change, “Summary for Policymakers of IPCC Special Report on Global Warming of 1.5°C approved by governments”, (8 October 2018), online: https://www.ipcc.ch/news_and_events/pr_181008_P48_spm.shtml.

⁵ Consider Solomon Hsiang et al, “Estimating economic damage from climate change in the United States” (2017) 256:6345 Science 1362 [Hsiang et al].

Arthur Pigou is famous for first articulating the rationale for imposing corrective measures for air pollution in the 1930s.⁶ In *The Economics of Welfare*, Pigou explores the problem of externalities, or as he puts it, when the “marginal private net product falls short of marginal social net product” and how to bring the two “more closely together.”⁷ Pigou was the first to observe that private transactions were not capturing all of the costs of burning fossil fuels when the price is negotiated between the buyer and seller.

At the time, Pigou’s observation was a novelty. Today, it explains how markets are encouraging emitters to continue unabated, increasing carbon concentrations at grossly unsustainable levels, which will eventually make the world much less inhabitable.⁸ The cost of such greenhouse gas emissions will be paid by tomorrow’s generation, and this cost will be astronomical.⁹ A comprehensive study, recently published in *Science*, makes some frightening projections.¹⁰

Today, experts largely agree that carbon pricing is the best option the global community has for mitigating these consequences.¹¹ By pricing the cost of emitting, instead of externalizing it upon the next generation, the hope is that market signals will change social behavior.¹² Conceptually, the challenge is that the actual cost of emitting in the future is impossible to predict with precision.¹³ However, in the face of the dire need to reduce carbon emissions and carbon concentrations, pragmatism has prevailed. Theory has adopted a “workability” for establishing price.¹⁴ Today, carbon prices are calculated based on the cost of maintaining an environmental standard, surrendering the pretense of price optimization in this context to “practicality”.¹⁵ Thus, the price is not set on a prediction of cost, but on the cost of ensuring that “the quality of the environment” meets a targeted standard: that is, an environment that approximates the inhabitability of the world presently.¹⁶

Such a practical approach to pricing is justified, considering that even when the announced policy intentions of the international community is taken into consideration, the world’s response to climate change will fall well short of the Paris Agreement’s targets for 2040.¹⁷ This projection is alarming, since the Secretariat of the United Nations Framework Convention on Climate

⁶ Stefan Speck, “The Design of Carbon and Broad-Based Energy Taxes in European Countries” (2008) 10 *VJEL* 31 at 36.

⁷ Arthur Cecil Pigou, *The Economics of Welfare*, 4th Ed (London: Macmillan, 1932) at Ch IX, § 10.

⁸ Consider Hsiang et al, *supra* note 5.

⁹ Note the complexity and uncertainty of even the best attempts to make such a calculation, *ibid*.

¹⁰ See generally, *ibid*.

¹¹ For instance, consider Andrea Baranzini et al, “Carbon pricing in climate policy: seven reasons, complementary instruments, and political economy considerations” (2017) 8 *WIREs Climate Change* 1 at 4-5.

¹² Ross Mckittrick, “A Practical Guide To The Economics of Carbon Pricing” (2016) 9 *School of Public Policy Research Papers* 1 at 5.

¹³ See generally, Hsiang et al, *supra* note 5.

¹⁴ William J Baumol & Wallace E Oates, “The Use of Standards and Prices for Protection of the Environment” (1971) 73 *Swedish J Economics* 42 [Baulmol and Oates].

¹⁵ *Ibid* at 51.

¹⁶ *Ibid*.

¹⁷ International Energy Agency, *World Energy Outlook* (Paris: OECD/IEA, 2017) at 327 [World Energy Outlook 2017].

Change (UNFCCC) freely admits that the “plan to meet the 2°C target” of the Paris Agreement will only “offer a 50:50 chance of avoiding the worst effects of climate change”.¹⁸

III. Carbon Pricing in Canada

GGPPA will set a floor for carbon pricing throughout Canada.¹⁹ This floor on price has been called the Benchmark.²⁰ On October 23 2018, Prime Minister Justin Trudeau issued a press release confirming that, starting in 2019, the Benchmark will be \$20/tonne of carbon emissions and that it will increase \$10 each year to \$50/tonne in 2022.²¹

If a province fails to meet the Benchmark, the federal government will impose it through an enforcement mechanism called the Backstop.²² The Backstop is triggered when a province becomes listed.²³ A “listed province” is defined as “a province or area listed in Part 1 of Schedule 1.”²⁴ When a province fails to meet the Benchmark, the Governor in Council lists the province, making it subject to the application of *GGPPA*.²⁵

As of the date of writing, *GGPPA*’s regulations have not been created. However, the technical updates on *GGPPA* indicate that if a province fails to implement a carbon pricing mechanism that meets the Benchmark by the end of 2018 then it will be listed.²⁶ In the same press release, the Prime Minister provided a preliminary list of the “listed provinces”: Saskatchewan, Manitoba, Ontario, New Brunswick, Yukon, and Nunavut.²⁷

IV. Validation of Carbon Pricing in Canada

¹⁸ Clive L Spash, “This Changes Nothing: The Paris Agreement to Ignore Reality” (2016) 13 *Globalizations* 928 at 929.

¹⁹ Office of the Prime Minister of Canada, “Prime Minister’s Speech: Pricing Carbon Pollution”, Prime Minister of Canada, online: <<https://pm.gc.ca/eng/news/2016/10/03/prime-minister-trudeau-delivers-speech-pricing-carbon-pollution>> [Speech on Pricing Carbon].

²⁰ Canada, *Pan-Canadian Framework on Clean Growth and Climate Change: Canada’s Plan to Address Climate Change and Grow the Economy* (Ottawa: Government of Canada, 2016) at 49, online: <<https://www.canada.ca/content/dam/themes/environment/documents/weather1/20161209-1-en.pdf>> [Pan-Canadian Framework].

²¹ John Paul Tasker, Trudeau promises rebates as Ottawa moves to levy carbon tax on provinces outside the climate plan, CBC News (October 23, 2018), online <<https://www.cbc.ca/news/politics/tasker-carbon-tax-plan-trudeau-1.4874258>> [Tasker].

²² Pan-Canadian Framework, *supra* note 20 at 49.

²³ *GGPPA*, *supra* note 3 at ss 10, 17-16, 38 & 40.

²⁴ *Ibid* at s 3.

²⁵ *Ibid* at ss 3 & 166(2).

²⁶ Pan-Canadian Framework, *supra* note 20 at 49. Also see, Environment and Climate Change Canada, Technical Paper on the Federal Carbon Pricing Backstop, Government of Canada (2017), Environment and Climate Change Canada at 5, online: <<https://www.canada.ca/content/dam/eccc/documents/pdf/20170518-2-en.pdf>>. [Technical Paper on Backstop]; Government of Canada, “Supplemental benchmark guidance”, Government of Canada, online: <<https://www.canada.ca/en/services/environment/weather/climatechange/pan-canadian-framework/guidance-carbon-pollution-pricing-benchmark/supplemental-benchmark-guidance.html>> [Supplemental Benchmark Guidance]; and Government of Canada, “Carbon pricing: compliance options under the federal output-based pricing system”, Government of Canada, online <<https://www.canada.ca/en/services/environment/weather/climatechange/climate-action/pricing-carbon-pollution/compliance-options-output-based-system.html>> [Compliance Options].

²⁷ Citation missing

The Canadian Constitution grants the authority to particular areas of regulation to either the Federal government or the provinces.²⁸ Each area of regulation is called a “head of power”.²⁹ If *GGPPA* is challenged, a court must determine if it was validly enacted under one of the federal heads of power.³⁰ First, a court will identify the “matter” of *GGPPA*.³¹ Second, it will determine if it fits under a head of power.³² If so, *GGPPA* is valid.³³ If not, it is *ultra vires*, beyond the scope of Parliament’s powers.³⁴ This constitutional analysis is known as the “pith and substance” test.³⁵

A detailed “pith and substance” analysis of *GGPPA* is not possible in this article, however this article follows the reasoning of one of its authors in a soon to be published article on the topic.³⁶ Its analysis aligns with the earlier work of Peter Hogg, who argues that the federal government’s criminal law power³⁷ is the best fit for *GGPPA*.³⁸ Both look to the Supreme Court of Canada (SCC) decision in *Hydro-Québec*, which held that if the matter of a federal statute is to protect the environment, then this fact can be used to establish a criminal law purpose of a federal statute under the criminal law power.³⁹

To be valid criminal law, *GGPPA* must create a prohibition⁴⁰ backed by penal sanction.⁴¹ However, *GGPPA*’s means of achieving this targeted prohibition can be a “circuitous path”.⁴² In other words, this prohibition and sanction need not look like the rules and corresponding punishments of the criminal code.⁴³ In a complex regulatory space, the SCC appreciates that a draconian strategy may not be the best means of achieving a prohibition, and that more circuitous strategies--like carbon pricing, which leverages markets to prevent pollution--may be more effective.⁴⁴

²⁸ *The Constitution Act, 1867*, 30 & 31 Vict, c 3, at ss 91 & 92 [CAUK].

²⁹ *Employment Insurance Act (Can.) ss.22 and 23*, [2005] 2 SCR 669, 258 DLR (4th) 243 at para 36 [*Re Employment Insurance*].

³⁰ *Ibid* at para 15.

³¹ Peter W Hogg, *Constitutional Law of Canada 5th Ed* (Toronto: Carswell, 2007) (loose-leaf updated) at 15-6 [Hogg 5th Ed].

³² *Re Employment Insurance*, *supra* note 29 at para 36.

³³ Hogg 5th Ed, *supra* note 31 at 15-6.

³⁴ *Ibid*.

³⁵ *Re Employment Insurance*, *supra* note 29 at para 15.

³⁶ Fenner L Stewart, Andrew Leach & Jennifer Winter, “A Federal Backstop to Provincial Carbon Pricing: Decarbonization in an Age of Uncooperative Federalism” (2019) [Stewart, Leach & Winter].

³⁷ CAUK at s 91(27).

³⁸ Peter W Hogg, “Constitutional Authority Over Greenhouse Gas Emissions” (2009) 46 *Alberta Law Review* 507 at 511.

³⁹ *R v Hydro-Québec*, [1997] 3 SCR 213, 151 DLR (4th) 32 at para 43 [*Hydro-Québec*].

⁴⁰ *Reference re Validity of Section 5 (a) Dairy Industry Act*, [1949] SCR 1, [1949] 1 DLR 433 [*Margarine Reference*]. But also see *Proprietary Articles Trade Association v Canada (Attorney General)*, [1931] AC 310, [1931] 2 DLR 1 [PATA].

⁴¹ *Margarine Reference*, *ibid*. But also PATA, *ibid*.

⁴² *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199, 127 DLR (4th) 1 at para 51 [*RJR-MacDonald*]. For further confirmation in the context of environmental regulation, see *Syncrude Canada Ltd v Canada (Attorney General)*, 2016 FCA 160 at para 85 [*Syncrude*].

⁴³ *RJR-MacDonald*, *ibid*. But also *Syncrude*, *ibid*.

⁴⁴ For more on such regulatory strategies, see Cristie Ford, *Innovation and the State, Regulation, and Justice* (Cambridge: Cambridge University Press, 2017) at 12.

Thus, *GGPPA* is a form of “flexible” criminal law, which leverages market forces (i.e., pricing as penalty) to reduce carbon emissions (i.e., the prohibition).⁴⁵

V. Enforcement of Carbon Pricing in Canada

GGPPA prevents carbon emissions, but it is not an absolute prohibition. The penalty, which attaches to this prohibition, is a price mechanism, which increases the cost of polluting over time (i.e., increases the penalty of polluting).⁴⁶ In this way, *GGPPA* allows Canadians to transition to a low-carbon lifestyle by offering financial incentives for making low-carbon choices (e.g., buying an electric car or smart energy technologies).⁴⁷

In theory, when the cost of emitting is high enough, market actors will avoid emitting.⁴⁸ This shift will create new demands, which in turn will create opportunities for profit.⁴⁹ Entrepreneurs will attempt to seize these opportunities, which will incentivize innovation.⁵⁰ Accordingly, they will invest in new technologies that provide both enhanced energy efficiency and cheap low-carbon fuels because it is profitable to do so.⁵¹ Thus, *GGPPA* leverages markets to drive decarbonization through price signals, optimizing polluter compliance and decarbonization innovation.⁵²

From a different vantage point on enforcement, *GGPPA* would never be implemented in an ideal world. It would merely direct provinces to create their own pricing mechanisms, tailoring a flexible decentered interprovincial network that would be calibrated for local economic circumstances.⁵³ The federal government would set the Benchmark, and all provinces would comply. Thus, *GGPPA* would be setting the prohibition (through the Benchmark), but tailored provincial compliance mechanisms would be imposing the penalty (i.e., the price).

⁴⁵ *Ibid.*

⁴⁶ *GGPPA*, *supra* note 3 at preamble; Technical Paper on Backstop, *supra* 26 at 4, 21; Pan-Canadian Framework, *supra* note 20 at 49; and Supplemental Benchmark Guidance, *supra* note 26.

⁴⁷ *GGPPA*, *ibid* at preamble.

⁴⁸ For projection as to how high carbon prices must be to affect change, see World Energy Outlook 2017, *supra* note 17 at 47-48.

⁴⁹ Anita Rønne, “Smart Cities and Smart Regulation: Accelerating Innovative Renewable Technologies in Energy Systems to Mitigate Climate Change” in Donald Zillman et al, eds, *Innovation in Energy Law and Technology: Dynamic Solutions for Energy Transitions* (Oxford: Oxford University Press, 2018) at 55-58.

⁵⁰ *Ibid.*

⁵¹ Consider the discussion of the connected demand for both energy efficiency and low-carbon fuels, see *ibid* at 309-329.

⁵² For more of the model and theories of modern environmental regulation, consider Cary Coglianese & Jennifer Nash, “The Law of the Test: Performance-Based Regulation and Diesel Emissions Control” (2017) 34 Yale J Reg 33; Dayna Nadine Scott & Adrian A Smith, “Sacrifice Zones in the Green Energy Economy: Toward an Environmental Justice Framework” (2016) 62 McGill LJ 861; Steven Cohen, *Understanding Environmental Policy* (New York: Columbia University Press, 2014); Lori S Benneer & Cary Coglianese, “Flexible Approaches to Environmental Regulation” in Michael Kraft & Sheldon Kamieniecki, eds, *The Oxford Handbook of U.S. Environmental Policy* (Oxford: Oxford University Press, 2012); Neil Gunningham & Darren Sinclair, *Smart Regulation: Designing Environment Policy* (Oxford: Oxford University Press, 1998); and Eric W Orts, “Reflexive Environmental Law” (1995) 89 Nw UL Rev 1227.

⁵³ *GGPPA*, *supra* note 3 at ss 17-35, 40, 48 & 165.

The caveat to this ideal vision is that smaller provinces, in theory, could elect to become a listed province, allowing the federal government to administer carbon pricing in the province.⁵⁴ In this way, such a province could avoid the costs of devising and then implementing a carbon pricing mechanism, while still receiving the benefit of the “net amount” of revenue.⁵⁵

However, when faced with an uncooperative jurisdiction, the federal government does not have to negotiate.⁵⁶ It can seize total jurisdiction over the entire field of regulation, removing the listed province from exercising any discretion over the matter.⁵⁷ After a province is listed, the federal government will impose *GGPPA* in the jurisdiction of the listed province, but has the discretion to grant, or not, any of the net amount of revenues to a province directly.⁵⁸ It enjoys the privilege of spending said revenues in the province as it sees fit, funding the climate change or revenue recycling initiatives that it prefers, removing the province completely from the carbon pricing initiative.⁵⁹

In fact, it is foreseeable that all provinces will eventually appreciate that cooperating with the federal government’s administration of the Benchmark is the best option (i.e., if the primary goal is to maximize jurisdictional autonomy).⁶⁰

VI. Conclusion

GGPPA represents Canada’s federal response to the global call to reduce carbon emissions. It does so through the application of carbon pricing in provinces that fail to implement a similar policy on their own.

As policy, its basis derives from expert consensus that carbon pricing represents the most effective tool policymakers possess in reducing emissions. In putting a price on carbon emissions, *GGPPA* allows consumers and emitters to make economic choices that more accurately reflect the costs of transactions. Thus, it is the operation of the market, through price signals, that will alter social behaviour towards less carbon-intensive activity. Moreover, the need for policy action in dealing with carbon emissions and the decarbonization of the economy is manifest if we hope to avoid some of the worst effects of climate change.

As law, it derives its basis from the Constitution. Constitutional analysis suggests *GGPPA* will be held to be valid criminal law. As criminal law, *GGPPA* creates enforcement mechanisms within the context of the statute, namely the operation of prohibition backed by penal sanction. While these provisions are critical to the internal functioning of *GGPPA*, to suggest they are the

⁵⁴ Stewart, Leach & Winter, *supra* note 36 at Part IV.

⁵⁵ *GGPPA*, *supra* note 3 at s 165(2).

⁵⁶ *Ibid* at ss 10, 17-16, 38 & 40.

⁵⁷ Some will be mindful of the occupants of the Supreme Court of Canada being reluctant to assume that the federal government intended to seize the entire field of jurisdiction overlap with a province, however, that this must be different as to whether or not the federal government can do so with clear intention, see Stewart, Leach & Winter, *supra* note 36. For more on this line of thinking on this point, see Hogg 5th Ed, *supra* note 31 at 16-15.

⁵⁸ *GGPPA*, *supra* note 3 at ss 17-35, 40, 48 & 165. But also consider Pan-Canadian Framework, *supra* note 20 at 49.

⁵⁹ Pan-Canadian Framework, *ibid* at 49.

⁶⁰ For more on rational choice theory, consider Gary S Becker, “Nobel Lecture: The Economic Way of Looking at Behavior” (1993) 101 J Political Economy 385.

primary driver of enforcement of the policy would be to misunderstand the power of the overall scheme.

Indeed, *GGPPA*'s real enforcement power flows from its actual existence as policy. In using its control of the Benchmark to set a minimum standard, and its discretion in how to distribute net revenues to provinces through the Backstop, the federal government looms large over how provinces implement policies of their own. Ideally, provinces would develop Benchmark-compliant policies, maintaining jurisdiction over the regulatory field, as well as the attendant revenues. Were this to occur, the Backstop would never be activated, and the Benchmark would be realized through provincial policies. In other words, *GGPPA*'s power flows not from the Backstop's *actual* use, but the ramifications from its *potential* use.

GGPPA's power is that the federal government has the authority to make the Benchmark non-negotiable.⁶¹ Uncooperative jurisdictions will realize their place in federalism in this context, and come to appreciate that in reality, cooperation under *GGPPA* serves to maximize jurisdictional autonomy.

Thus, *GGPPA* reflects a potentially cooperative exercise in how the federal and provincial governments approach emissions reductions. Provinces are free to pursue plans that account for their unique economies and geographies within the rubric of the federal Benchmark, or they can abdicate the field (and its revenues) in favour of the federal government. And, what might be a stick to larger provinces may be a carrot to smaller ones, who may elect to allow the operation of the Backstop and save the expense of developing a provincial scheme.

This is the true nature of the enforcement of *GGPPA*: a nudge toward compliance and cooperation within a federal system.

⁶¹ *GGPPA*, *supra* note 3 at ss 10, 17-16, 38 & 40.